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July 27, 2004

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Ms. Marlene H. Dortch
Secretary
Federal Communications Commission
445 12th Street, NW
Washington, DC 20554

Federal Communications Commission
Office of the Secretary

Re: Ex parte submission, Docket 04-62 (Content
Protection for Recordable Media - Video)

Dear Ms. Dortch:

This letter is submitted on behalf of our client, the 4C Entity, LLC ("4C"), to respond to recent submissions made into the above-captioned docket by Philips Electronics ("Philips").

At the outset, it may be important to review the context for considering Philips' comments. We believe that there are several salient points:

First, the market for protected recording of broadcast flag content (Marked Content or Unscreened Content) is going to be very competitive, with manufacturers (and, therefore, consumers) having many choices of media and protected recording technologies.¹ All of the technologies submitted for approval by the Commission provide protected recording of such content using various forms of recordable media, with the exception of DCP and HDCP, which are solely protected transmission technologies. Manufacturers will be able to choose from among the technologies approved by the Commission and other technologies that meet the "robust method" requirements of the

¹ Since the broadcast flag regulations have not gone into effect, the phrase used above is necessarily written to look to the future, when the regulations are in effect. Even in the absence of the broadcast flag regulations, the environment for protected recording technologies in other contexts is already becoming competitive and will be more so in the near future.

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Commission's regulations (without need for submission of these technologies for specific approval by the Commission). Consequently, the marketplace can and should be relied upon to "regulate" the licensing terms and conditions offered by the various suppliers of these technologies. License terms applicable to a particular protected recording technology that may be onerous for whatever reason will produce shifts to other forms of recordable media and protected recording technologies, thereby encouraging the market to accommodate license terms that are not onerous. The Commission will have done its job merely by ensuring that the certification process is open to competing technologies, so as to permit the market to work.

Second, it is important to understand Philips' role in this competitive marketplace. Philips is a co-developer and co-licensor of the "plus" forms of consumer recordable optical media (+R/+RW). This media competes directly with the "dash" forms of consumer recordable optical media (DVD-R, -RW, and -RAM). As the proprietor of the +R/+RW format, Philips has chosen to differentiate that format by offering its own content protection system (Vidi) and to preclude the use of CPRM for the +R/+RW format.² Of course, Philips receives royalties for licensing the base format itself, which means that the fees charged for Vidi are simply "add ons" to those format royalties. As the format proprietor, Philips' power over the format has effectively blocked competition for content protection systems applicable to the +R/+RW format. In contrast, 4C has no role vis a vis the underlying formats to which CPRM is applicable, and so does not, and can not, exercise the type of power that Philips has, and has exercised, with regard to the form of content protection applicable to +R/+RW.

Third, the terms and conditions of 4C's license for CPRM are "reasonable and non-discriminatory" when viewed, as they must be, in context and under the rule of reason analysis of their competitive (or anti-competitive) effects. The context includes both the competitive market noted above and the entirety of the license.

The competitive market must be understood, as well, with regard to the role of content protection. Content protection is not a product "feature" for which a manufacturer or consumer will pay extra in order to have in the product. Content protection technologies inhibit functions that the products would otherwise offer. Such technologies are included in products in order to comply with government requirements

² Working with Philips in late 2002 and through much of the first half of 2003, 4C had developed a specification for applying CPRM to the +R/+RW format, but Philips unexpectedly and without explanation cut off that work, apparently opting to use its own content protection system for that format. 4C remains willing to finalize and offer CPRM for the +R/+RW format, but is not in a position to do so without cooperation from the format's proprietors.

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(such as the broadcast flag regulations) or to gain access to content that is promised to be available only where the content protection technologies are in place. While the reasons are important, they are not of the same character as technologies that offer sharper pictures, better sound, or exciting new features or functions. So, content protection and their associated licenses must minimize their impact on manufacturers and consumers (in terms of their burden on the products either technically or financially or of their inhibition on expected product functions) or packaged with other exciting features sufficient to compensate for the negative elements of the content protection's inhibitions on product capability.

4C has devised its licenses to enable the development of markets using content protection, understanding these points about the markets into which content protection is introduced. 4C concluded that the market environment would not support royalties or other fees at levels that would normally be charged for commercially deployed intellectual property of the sort employed in CPRM. Accordingly, the 4C fees are set substantially below those that any of its Founders would normally charge for such IP. Having made that decision, 4C further concluded that it would be unfair, and the market for content requiring protection would not be enabled, if CPRM licensees asserted their own patent claims against 4C, the 4C Founders or CPRM licensees, seeking "normal" IP royalties. In that context, the non-assertion provision of the 4C license is both reasonable – in that it is designed to facilitate low cost licensing (the FCC's traditional use of the term "reasonable") and in that this provision is necessary to enable the development of the markets for content requiring protection – and non-discriminatory, in that every licensee is treated the same.³ Certainly, taken as a whole, the 4C license is reasonable and non-discriminatory as the FCC has used that phrase.

In any event, Philips' citations to court cases and standards bodies' policies are both inaccurate and highly misleading, as demonstrated below.

- Philips now seems to have hit on the various antitrust actions involving Microsoft as somehow analogous to this situation. Such a comparison is simply not correct in several regards:
 - Microsoft had already been found to have exercised its market power in anticompetitive ways, and the analysis of the non-assertion provisions must be viewed in that context. 4C has not been shown to have market power nor

³ Philips has offered a novel theory that it is discriminatory to treat a licensee that has IP that it might otherwise assert, but for the non-assertion clause, the same as a licensee that has no such IP. That theory is not supported in any understanding of the term "non-discriminatory" that 4C is aware of.

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has it been shown to have exercised market power in anticompetitive ways. Any analysis of 4C's non-assertion clause begins in a very different place than the analysis of Microsoft's use of such clauses.

- The U.S. Justice Department did not, in fact, find that the Microsoft non-assertion provisions were anticompetitive. Rather, the parties agreed that removal of the non-assertion clauses from certain licenses would avoid "misinterpretation" of the "options and alternatives offered" by Microsoft.
- The Joint Status Report issued by the Justice Department and Microsoft indicates that the non-assert provision in current and past OEM licenses will remain in effect, limiting the ability of OEMs to assert patents against Microsoft regarding features and functions already present in Windows XP. It is apparent from this that the use of non-assertion provisions even by Microsoft is a matter for careful analysis and evaluation, not subject to an automatic finding of anticompetitive behavior.
- The action by the Japanese authorities seems to be a follow-on to the U.S. actions, and, in any event, provide no analysis of the provisions to shed light on the circumstances under which the use of non-assertion clauses would be found to be anticompetitive.
- Philips' citation of *Alabama Electric Cooperative, Inc. v Federal Energy Regulatory Commission*, 684 F.2d 20 (1982) is inaccurate in that the "discrimination" in that case is very different from the "discrimination" alleged by Philips here. The *Alabama Electric Cooperative* case involved a situation in which the court invalidated an electricity rate structure that charged two customers different rates where the utility's costs for providing service to each customer was the same. The court did not evaluate the situation where a particular customer may be disproportionately burdened by a uniform rate, which is essentially Philips' argument concerning the situation here. The citation of this case is also misleading in that the two regulatory environments are vastly different. In the electric utility context, the regulation of pricing was done pursuant to a very specific statutory mandate and highly

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developed regime for evaluating pricing by the utility. Here, the main point of the FCC's regulation is the protection of content, and the evaluation of license terms and conditions is, at most, ancillary to the main regulatory regime and the agency's expertise.

- The use of *Georgia Pacific Corp. v. United States Plywood Corp.*, 318 F. Supp. 116 (S.D.N.Y. 1970) fails to note that the court evaluated fifteen evidentiary factors in determining the amount of a reasonable royalty for a patent license. First, the court clearly weighed various factors in determining the reasonableness of royalty rates, and did not single out any particular factor. Second, the case does not provide any authority to suggest that the Commission cannot consider the benefits of lower costs that accrue to adopters in determining whether the 4C license is reasonable.
- In *Building Owners and Managers Association International v. FCC*, 254 F. 3d 89 (D.C.Cir. 2001), the court upheld a rule prohibiting neighborhood association rules or building owners' restrictions on DBS reception devices, finding that the FCC had clear statutory authority to issue such a regulation and that the agency had expertise to which the court owed deference in determining whether the particular regulation was reasonable. Here, no one is challenging the FCC's general policy regarding "reasonable and non-discriminatory" licensing, but rather whether the FCC must find that a particular license term renders the entire license not reasonable and non-discriminatory. The case simply provides no support for what Philips would have this agency do in this situation.

4C has responded repeatedly to Philips' arguments concerning the means under which changes may be made to certain compliance and robustness rules. First, under the license agreement, 4C is not permitted to make material changes in the Specifications, once they have reached version 1.0 (as all of the core technology specifications have already done), and the non-assertion provision relates only to patent claims that are "necessary" to implement the Specification. Changes in the compliance and robustness rules do not affect the scope of the non-assertion clause. Second, changes in compliance and robustness rules are carefully limited to those that are necessary to ensure continued protection of audio-visual content.

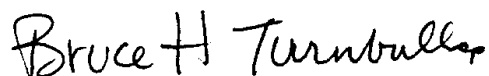
In short, the recent filings by Philips offer no more than their original objection – many pages of argument based on no legal precedent and flawed analogies and argument – but the continued push by Philips can be understood only as an attempt to

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get this Commission to create an advantage for Philips' proprietary recordable media formats, thereby reducing competition in the consumer recording market and harming consumers in the process. The Commission should reject Philips' plain efforts to misuse this process for its own competitive reasons and approve CPRM for Video for use with Marked Content and Unscreened Content.⁴

Should any of the Commissioners or their staffs have any questions concerning this filing or any aspect of the 4C CPRM for Video, please do not hesitate to contact the undersigned.

Respectfully submitted,



Bruce H. Turnbull

cc: The Honorable Michael K. Powell, Chairman
The Honorable Kathleen Q. Abernathy
The Honorable Jonathan S. Adelstein
The Honorable Michael J. Copps
The Honorable Kevin J. Martin
W. Kenneth Ferree
Rick C. Chesson
Susan Mort

⁴ The Commission should also reject Philips' belated attempt to suggest conditions that could be attached to approval of CPRM. First, the conditions proposed are wholly unnecessary in light of the refutation of the underlying arguments made by Philips. Second, the particular conditions are both infeasible and unfair. This is primarily because there are already over 150 licensees, who have accepted the terms and conditions now offered and who have relied on the approach taken in the license, perhaps especially in the areas complained of by Philips. The conditions proposed by Philips would be completely inconsistent with the existing licenses for all 150 plus licensees. These agreements cannot simply be abrogated by 4C to be replaced by a new set of licensees designed to suit Philips' proposals. We note as well that, as spelled out in more detail above, the proposals by Philips are much more likely to have been made in the spirit of undermining the recording formats using CPRM for protection than in a real attempt to find a reasonable approach for the Commission to take.